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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 998

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL UNION 612, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–5a) is reported at 337 F. 2d 697. The Board's decision and order (Pet. 1b–13b, 1c–29c) are reported at 143 NLRB 1372.

JURISDICTION

The decision of the court of appeals was rendered on October 2, 1964 (Pet. 1a). Petitions for rehearing filed by both the employer and petitioner union were denied on December 21, 1964 (Pet. 1e). The decree

of the court of appeals was entered on December 30, 1963 (Pet. 1f–1g). The petition for certiorari was filed on March 18, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the employer refused to bargain in violation of the National Labor Relations Act in rejecting a union bargaining demand for a unit which included supervisory personnel.

2. Whether substantial evidence supports the Board's finding that the employer's multiple-owner-drivers are supervisors within the meaning of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth at pp. 1d–3d of the petition.

STATEMENT

Deaton Truck Lines, Inc., is a common carrier, located in Birmingham, Alabama, engaged in the long-distance hauling of freight by motor vehicle (Pet. 2b; R. 15, 21 D.A. 45).[1] Deaton has 263 trucks in

[1] "R." references are to the printed Transcript of Record in case No. 20791 (*Deaton Truck Lines* v. *National Labor Relations Board*) which was consolidated with the instant case, No. 21332, in the court of appeals. "D.A." references are to the appendix to Deaton's brief in No. 20791. "J.A." references are to the joint appendix of the Board and the Union in the court of appeals. Copies of these documents have been filed with the petition.

its fleet, owning three outright and operating the balance as lessee. (Pet. 2b; D.A. 47). Deaton leases 110 of these trucks from nondriver-owners who furnish a driver with the truck. The remaining 150 are leased either from owner-drivers who own a single truck which they drive themselves, or from multiple-owner-drivers who own several trucks and who drive one truck themselves and furnish drivers with the others. (Pet. 2b, 5b–6b; D.A. 47, 58, 163.)

In August, 1956, after a 10-week recognition strike, Deaton and a "Committee" comprised of several owner-drivers and representatives of Teamsters Local Union 612 ("the Union") entered into an agreement setting forth "working rules" for Deaton's drivers (Pet. 2b; J.A. 94–95, D.A. 100). In May, 1957, Deaton and the Union entered into a more conventional collective bargaining contract. This agreement expired in 1959 when the parties executed a contract with an expiration date of July, 1962 (Pet. 2b; J.A. 215, 283).

In 1960, Deaton was sold to Edwin Sellers (Pet. 3b; J.A. 51–52, D.A. 26). Sellers continued to operate under the 1959 collective bargaining agreement (Pet. 3b; J.A. 86–88, 100). On May 11, 1962, the Union notified Deaton that it desired to open the existing agreement (Pet. 3b; J.A. 82, 249). Negotiating meetings were held by Deaton and the Union in June and July, 1962 (Pet. 3b–4b; J.A. 27–28, 83–85, 88). The contract proposals which the Union presented to Deaton differed from the existing agreement in that they provided for payment of drivers on a mileage,

rather than a percentage-of-revenue, basis and for payment of separate amounts for driving and for truck rental (R. 84; J.A. 27–28, 250–252, D.A. 120–149). The Union's proposed contract also provided that all of the drivers were to be considered as Deaton employees (Pet. 3b; D.A. 121).[2] Deaton objected to the Union's proposals, stating that it was "unwilling to recognize the drivers as 'employees' for the purpose [of] negotiating a new contract" (Pet. 4b; J.A. 28, 250).[3] Sellers stated that he would agree to an extension of the existing contract, or to negotiate minor changes in it, provided the Union would stipulate that the owner-drivers were to be considered independent contractors pending the outcome of three

[2] There were then three suits involving Deaton and the Union pending in the federal courts concerning the question whether the owner-drivers were employees or independent contractors. Deaton's position was that they were independent contractors (Pet. 3b, 5c; D.A. (Vol. III) 76, 87–88, D.A. (Vol. IV) 14, D.A. 45 *ff.*). Two of these suits were actions brought by the Union under Section 301 of the Act to compel Deaton to arbitrate grievances. *International Brotherhood of Teamsters, etc., Local 612* v. *Deaton Truck Lines, Inc.*, 307 F. 2d 748 (C.A. 5); *Deaton Truck Lines, Inc.* v. *Local 612, etc.* (No. 19688), 314 F. 2d 418 (C.A. 5). The third case, *Deaton Truck Lines, Inc.* v. *Local Union No. 612* (No. 10135–S, N.D. Ala.) was brought by the Company to obtain a declaratory judgment that a union assessment and dues checkoff were unlawful because the owner-drivers were not employees under the Act.

[3] Deaton conceded that the individuals who drove the three trucks which it owned were its employees. As to the leased trucks, however, the Company contended that the owner-drivers were independent contractors, and that the other drivers were employees of the lessors of the trucks. The Union made no claim to represent non-driver owners. (Pet. 9c.)

judicial proceedings where that question was then in issue.[4] (Pet. 4b; J.A. 28). The Union rejected this suggestion, insisting that Deaton bargain with it as the representative of all Deaton drivers (J.A. 29–30, 251).

On July 19, 1962, Deaton sent a notice of cancellation of existing leases to its owner-drivers. Enclosed were new leases which specified that the status of the owner-driver was that of an independent contractor (Pet. 5b; D.A. 150–160). A week later, Deaton and the Union entered into a "truce agreement" which continued in effect the terms and conditions of the last contract (Pet. 5b; D.A. 116–118).

The Union then filed unfair labor practice charges with the Board, charging that Deaton had violated Sections 8(a) (5) and (1) of the Act by failing to bargain with the Union on behalf of "all road drivers in the Deaton operation" (R. 11). A complaint was issued (R. 14–18). The Board, after hearing, found that Deaton had not violated the Act and dismissed the complaint. The Board rejected Deaton's contention that the owner-drivers were independent contractors and found instead that "the relationship between the Company and all drivers of its fleet is one of employment" (Pet. 10b–11b). The Board further found, however, that the multiple-owner-drivers were supervisory employees within the mean-

[4] See note 2, *supra*. Both the 1957 and 1959 contracts provided that all "Mechanics, Helpers, Drivers, Driver Owners, etc." would become members of the Union after 30 days' employment, but did not specifically set forth a unit description (Pet. 2b).

ing of Section 2(11) of the Act,[5] and that the Union's bargaining demand included the multiple-owner-drivers. The Union had thus sought recognition in an inappropriate unit. In these circumstances, the Board concluded that Deaton was warranted in refusing the Union's demand. (Pet. 11b.)

The court of appeals sustained the Board's dismissal of the complaint against Deaton. The court concluded that the evidence supported the Board's finding that the multiple-owner-drivers were supervisory employees of Deaton, and that the Board had properly determined that Deaton was under no duty to bargain for a unit including them (Pet. 1a–5a).

ARGUMENT

1. Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain

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[5] The record shows that the multiple-owner-drivers have substantial authority to determine the drivers who are to operate their trucks. Deaton determines those applicants for employment who are qualified to drive in its fleet. A non-owner applicant who is found to be qualified becomes a member of the Company's reserve pool of qualified drivers (Pet. 11b; J.A. 102–103, 125–127). However, the multiple-owner-driver may choose from this pool any driver he prefers for his trucks (Pet. 11b; J.A. 126–127).

In addition, a multiple-owner-driver has discretion to transfer drivers from one truck to another—and such transfers have a direct effect on the driver's earnings (Pet. 11b; D.A. 60, 61, 96–97). The multiple-owner-driver also possesses power to remove permanently from one of his trucks any driver he finds objectionable. Although such removal does not disqualify the employee as a Company driver, he must be chosen by another multiple-owner-driver before he can drive again in the Company fleet (D.A. 67, D.A. (Vol. III) 109, D.A. (Vol. IV) 127).

collectively with the representatives of his employees, subject to the provisions of section 9(a)." Section 9(a) provides that "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees *in a unit appropriate for such purposes,* shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining * * *" (emphasis added). Accordingly, a prerequisite to invoking the bargaining obligation imposed by Section 8(a)(5) is that a demand be made with respect to an appropriate bargaining unit. See *National Labor Relations Board* v. *Columbian Enameling and Stamping Co.,* 306 U.S. 292. Since supervisory employees are exempt from the coverage of the Act and an employer is under no obligation to bargain with a union over the terms and conditions of their employment, a bargaining unit which includes such employees would not ordinarily be appropriate. An employer would thus be justified in declining a request to bargain with respect to that kind of a unit. Petitioner does not challenge that settled rule. The only question in this case is whether the Board should not have applied the principle here because the supervisory employees in the unit (the multiple-owner-drivers) comprised only a minority of the employees in the unit (about 20 out of a total of 260 drivers) (Pet. 9–11). So narrow an issue, which turns on the facts of the particular case, does not warrant review by this Court.

Furthermore, the Board's conclusion was wholly reasonable. Unlike the cases cited in the petition

(p. 10),[6] where the variance between the unit requested and the one ultimately found to be appropriate was unrelated to the employer's refusal to bargain, here the status of Deaton's drivers and the question of whether they were entitled to representation rights had been a major issue in the negotiations. It was the Union's insistence that they were all employees and Deaton's unwillingness to concede that point which caused negotiations to founder. In these circumstances, when the Board found that the unit demanded by the Union did in fact contain twenty drivers who were not employees within the meaning of the Act, it was reasonable for the Board to treat the variance as both substantial and relevant and to conclude that Deaton did not violate Section 8(a)(5) of the Act by refusing to bargain with respect to that unit. See *Alabama Marble Co.*, 83 NLRB 1047, 1070; *Page Aircraft Maintenance, Inc.*, 123 NLRB 159, 164; *Quality Food Markets, Inc.*, 126 NLRB 349, 351.

Petitioner is not aided by *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283, and the explication of that decision set forth in *United States* v. *Drum*, 368 U.S. 370, 382–383, n. 26 (Pet. 7–9). *Oliver* holds that the "contracting out" of work being performed by employees in the bargaining unit can undermine the standards established for those employees; therefore, they have a legitimate interest in bargaining about the subject and in attempting to limit the con-

[6] *Brewery and Beverage Drivers, Local 67* v. *National Labor Relations Board*, 257 F. 2d 194 (C.A.D.C.); *Bethlehem Steel Co. (Shipbuilding Div.)* v. *National Labor Relations Board*, 320 F. 2d 615 (C.A. 3), certiorari denied, 375 U.S. 984.

ditions under which contracting out will occur. See *Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* 379 U.S. 203. The Union here did not confine itself to bargaining about the conditions under which work of the bargaining unit would be contracted out; rather, it insisted on obtaining recognition for, and bargaining on behalf of, individuals (the multiple-owner-drivers) who were not employees within the meaning of the Act (see, *e.g.,* J.A. 251). Nothing in *Oliver* permits such a demand. Cf. *National Labor Relations Board* v. *Retail Clerks,* 203 F. 2d 165, 211 F. 2d 759 (C.A. 9), certiorari denied, 348 U.S. 839.

2. The Union's challenge to the Board's finding that the multiple-owner-drivers have the status of supervisors (Pet. 11–13) raises a second factual issue which does not warrant review by this Court after full review by the court of appeals. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491. Moreover, the record amply supports the Board's finding that the multiple-owner-drivers, through their control over who is to drive Deaton trucks, exercise supervisory authority (see note 5, *supra*). The Union's contention that the multiple-owner-drivers exercise their supervisory authority exclusively in their own interests rather than in the interest of Deaton, as Section 2(11) requires, is erroneous. As the court of appeals noted (Pet. 5a): "All drivers handle cargo exclusively for Deaton, in trucks bearing Deaton's name. Granted that the supervisory authority is to be exercised in the interest

of the multiple owner, such interest is so intertwined with the interest of Deaton in the successful and efficient operation of the trucks that it cannot be denied in most instances of actual execution the supervisory authority is in the interest of both Deaton and of the multiple owner."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

ALLISON W. BROWN, JR.,
Attorney,
National Labor Relations Board.

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